

IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF TEXAS  
SAN ANTONIO DIVISION

D&M SPECIALTIES, INC.	§	
	§	
Plaintiff,	§	
	§	
V.	§	CIVIL ACTION NO.
	§	SA12-CV-0588
APACHE CREEK PROPERTIES, L.C.	§	
and APACHE CREEK PROPERTIES, L.C.	§	
d/b/a DIMENSION MILLWORKS,	§	
	§	
Defendants.	§	

**MOTION TO DISMISS AND BRIEF IN SUPPORT**

TO THE HONORABLE JUDGE OF SAID COURT:

Defendants Apache Creek Properties, L. C. and Apache Creek Properties, L. C. d/b/a Dimension Millworks (“DMI”), move this Court to dismiss the subject Complaint on the grounds that the Court lacks jurisdiction over the subject matter or Plaintiff has failed to state a claim upon which relief can be granted pursuant to Rule 12(b)(1) and (6) respectively of the Federal Rules of Civil Procedures, and shows the Court the following:

1. Plaintiff alleges that there exists diversity jurisdiction in this matter in that the amount in controversy, exclusive of costs and interest, exceeds \$75,000.00, and all parties are diverse with respect to 28 USC § 1332 (2006). Yet, Plaintiff fails to allege any facts that would support its claim for damages in an amount that would exceed \$75,000.00 as required by 28 USC § 1332 (2006) for establishing subject matter jurisdiction based on diversity. Instead, Plaintiff simply refers to small percentages of sales orders for DMI products and DMI contracts comprised exclusively of doors.

2. Moreover, Plaintiff sues on the basis of an alleged “Contract” with Defendants which it attaches as Exhibit 1 to its Complaint. What Plaintiff fails to advise the Court of is that the parties terminated their business relationship and settled all matters of controversy between themselves as a matter of law.

3. Attached to this Motion as Exhibit “A” is the Affidavit of Ronald C. Hodge In Support of Motion to Dismiss (“Affidavit of Mr. Hodge”), which sets forth the parties settlement agreement dated July 01, 2009 signed by the representatives of each party, including the Plaintiff for valuable consideration which was acknowledged by Plaintiff. See Exhibit “A” attached hereto and incorporated herein for all purposes.

4. At a minimum, the July 1, 2009 settlement agreement sets the ceiling on the amount in controversy between the parties; that is, two payments of \$9,302.50 for commissions due, for a total of only \$18,605.00, an amount well below the jurisdictional minimum of \$75,000.00. See the settlement agreement attached to the Affidavit of Mr. Hodge.

5. Therefore, given that the amount in controversy is so low (\$18,605.00), the Plaintiff’s damages do not meet or exceed the threshold sum of \$75,000.00 to establish diversity jurisdiction in order to bring a cause of action against the Defendants under 28 USC § 1332 (2006). As a result, under Rule 12(b)(1) of the Federal Rules of Civil Procedure there is no subject matter jurisdiction.

6. In addition, since the Plaintiff and Defendants have settled the amount in controversy between them by virtue of the above-referenced settlement agreement dated July 1, 2009, there cannot be any cause of action still viable for which Plaintiff could sue Defendants and hence, Plaintiff has failed to state a cause of action against Defendants upon which relief can be granted pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

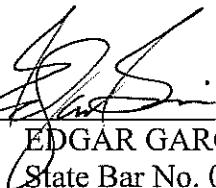
7. Finally, since a dismissal is appropriate pursuant to Rule 12(b)(1) or Rule 12(b)(6) of the Federal Rules of Civil Procedure the Court's supplemental jurisdiction over all of the state law claims alleged are precluded. Austral Oil Co., Inc. v. National Park Service, 982 F. Supp. 1238 (N.D. Tex. 1997). See also Nowak v. Ironworkers Local 6 Pension Fund, 81 F.3d 1182, 1187 (2nd Cir. 1996).

WHEREFORE, Defendants Apache Creek Properties, L. C. and Apache Creek Properties, L. C. d/b/a Dimension Millworks respectfully request that this Court dismiss Plaintiff's causes of action against Defendants as set forth above, and grant Defendants such other and further relief to which they have shown themselves entitled.

Respectfully submitted,

E. GARCIA LAW, PLLC  
10500 Heritage Boulevard, Suite 107  
San Antonio, Texas 78216-3631  
Telephone: (210) 524-9002  
Facsimile: (210) 524-9072

By:

  
EDGAR GARCIA  
State Bar No. 07632020

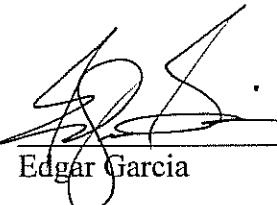
ATTORNEYS FOR DEFENDANTS

**CERTIFICATE OF SERVICE**

I certify that the below and foregoing document was sent via certified mail, return receipt requested to all counsel of record on this the 15<sup>th</sup> day of August, 2012, pursuant to the Federal Rules of Civil Procedure.

Ron S. Rainey  
Jason L. Fowell  
Triticco Rainey, P.L.L.C.  
446 Heights Boulevard  
Houston, Texas 77007  
(713) 581-3360 (Fax)

ATTORNEYS FOR PLAINTFF



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Edgar Garcia

IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF TEXAS  
SAN ANTONIO DIVISION

D&M SPECIALTIES, INC.

§

Plaintiff,

§

v.

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CIVIL ACTION NO.

APACHE CREEK PROPERTIES, L.C.  
and APACHE CREEK PROPERTIES, L.C.  
d/b/a DIMENSION MILLWORKS,

§

§

§

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Defendants.

§

SA12-CV-0588

AFFIDAVIT OF RONALD C. HODGE

IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

STATE OF TEXAS §

§

COUNTY OF BEXAR §

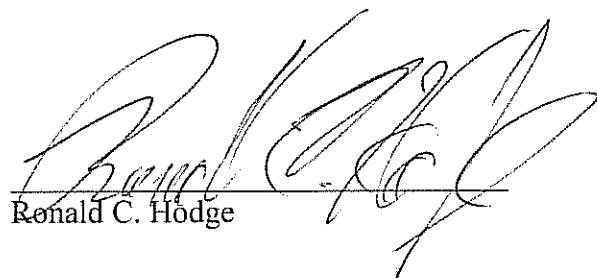
§

BEFORE ME, the undersigned authority, this day personally appeared Ronald C. Hodge, known to me, who, being first duly sworn, deposed and testified upon his oath as follows:

1. "My name is Ronald C. Hodge. I am the Managing Member of Dimension Millworks, LC f/k/a Apache Creek, LC. I am over the age of 21 years and am fully competent and authorized in all respects to execute this Affidavit. All matters stated herein are true and correct and within my personal knowledge.
2. Dimension Millworks, LC f/k/a Apache Creek, LC is the Defendant in the above-referenced civil action.
3. On July 1, 2009, the parties to this dispute entered into a settlement agreement which settled all matters of controversy between them including any and all financial matters arising from the business relationship between the parties. This settlement was reduced to a writing dated July 1, 2009, and was signed by a representative of each party. A true and correct copy of the settlement agreement is attached hereto as Exhibit 1.
4. The consideration recited in the settlement agreement were two payments of \$9,302.50 for a total of only \$18,605.00 in return for the release of all financial claims now or in the future such as payments, commissions, or services.



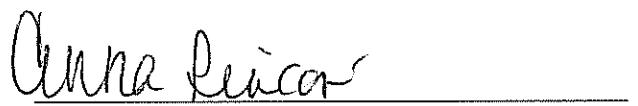
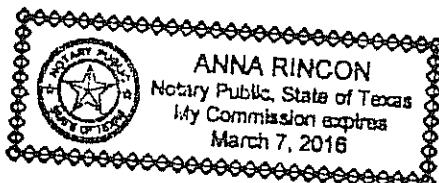
5. Moreover, the settlement agreement specifically states that it terminated the business relationship between the parties as well.
6. There has been no other business between the parties and hence, no further amounts are or could be due to the Plaintiff.
7. Further, affiant sayeth not."



Ronald C. Hodge

SUBSCRIBED AND SWORN TO before me, the undersigned authority, on this the

15th day of August 2012, to certify which witness my hand and seal of office.



Anna Rincon  
Notary Public in and for the State of Texas

Apache Creek, LC dba  
**Dimension**  
M I L L W O R K S

July 01, 2009

This Agreement is made by and between Apache Creek LC d/b/a Dimension Millworks ("Dimension") and D & M Specialties ('D&M').

Upon receipt of the two payments of \$9,302.50 for commissions due; D&M releases all financial claims now and in the future such as; payments, commissions, or services from Dimension. In addition, D&M agrees there will no financial claims now or in the future against Dimension, Apache Creek LC , Ronnie Hodge, or any other employee or representative of Dimension.

The first payment will be hand delivered on July 1, 2009 and the second payment will be mailed on or about August 01, 2009 to D&M's designated location or address.

D&M agrees, on July 1, 2009; to release all samples and related materials located at the showroom location: 6170 East Chapman Road, Orange, CA 92869; to Dimension's designated contract trucking company for return to Dimension in San Antonio, Texas.

This agreement serves as the termination of the business relationship between Dimension and D&M.

July 01, 2009

Apache Creek LC d/b/a  
Dimension Millworks

By \_\_\_\_\_

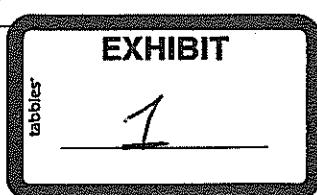
Mike Norris

D & M Specialties, Inc.

By \_\_\_\_\_

McKenzie Maxwell

July 1, 09



**IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF TEXAS  
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## **D&M SPECIALTIES, INC.**

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**Plaintiff,**

**CIVIL ACTION NO.**

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**APACHE CREEK PROPERTIES, L.C.  
and APACHE CREEK PROPERTIES, L.C.  
d/b/a DIMENSION MILLWORKS,**

SA12-CV-0588

## Defendants.

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## **ORDER GRANTING DEFENDANTS' MOTION TO DISMISS**

On this day came on to be heard the Motion to Dismiss of Defendants Apache Creek Properties, L. C. and Apache Creek Properties, L. C. d/b/a Dimension Millworks and any response thereto, and the Court having considered same is of the opinion that it should be

**GRANTED.**

IT IS THEREFORE ORDERED that Defendants' Motion to Dismiss is **GRANTED** in its entirety and Plaintiff's Complaint is hereby **DISMISSED** as to all causes of action against Defendants Apache Creek Properties, L. C. and Apache Creek Properties, L. C. d/b/a Dimension Millworks.

Signed this \_\_\_\_\_ day of \_\_\_\_\_, 2012.

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## United States District Judge